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No.

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's definition of a "whistleblower."

CORPORATE DISCLOSURE STATEMENT

Petitioner Digital Realty Trust, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Digital Realty Trust, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 850 F.3d 1045. The order of the district court denying petitioner's motion to dismiss (App., *infra*, 12a-47a) is reported at 119 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. 78u-6(a)(6), provides:

> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

Section 922 of the Dodd-Frank Act, codified in relevant part at 15 U.S.C. 78u-6(h)(1)(A), further provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

STATEMENT

This case presents a clear and intractable conflict on an important and recurring question of statutory interpretation. The Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). The Act proceeds to prohibit retaliation against "whistleblowers" who, *inter alia*, "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002" and other securities laws. 15 U.S.C. 78u-6(h)(1)(A). The question presented is whether that anti-retaliation provision extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the statutory definition of a "whistleblower."

Respondent is a former employee of petitioner. As is relevant here, after being terminated, he sued under the anti-retaliation provision of the Dodd-Frank Act, alleging that he was fired for making internal complaints protected under the Sarbanes-Oxley Act. Respondent did not report the alleged misconduct to the SEC. Petitioner moved to dismiss the Dodd-Frank Act claim, arguing that respondent could not maintain a claim under the anti-retaliation provision because he was not a "whistleblower" within the meaning of the provision. The district court denied the motion.

A divided panel of the Ninth Circuit affirmed. Over a dissent from Judge Owens, the court held that the anti-retaliation provision applies to all individuals who make internal reports under the Sarbanes-Oxley Act and other federal laws, regardless of whether the individual qualifies as a "whistleblower" under the statutory definition. As the Ninth Circuit explicitly recognized, its decision deepened a split of authority in the federal courts of appeals on the question presented. Because this case is an

optimal vehicle for resolving that conflict, the petition for a writ of certiorari should be granted.

1. This case concerns Section 922 of the Dodd-Frank Act, entitled "Securities Whistleblower Incentives and Protection" and codified at 15 U.S.C. 78u-6. That section has three principal parts: it defines key terms, creates an incentive program for "whistleblowers" who report to the SEC, and protects those same "whistleblowers" from retaliation.

The definitional provision starts by specifying that "the following definitions shall apply" "[i]n this section." 15 U.S.C. 78u-6(a). As relevant here, it proceeds to define a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6).

Incorporating that definition, the section then creates an incentive program for "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). Such whistleblowers are entitled to receive a monetary "award" from a special fund created by the Act. See 15 U.S.C. 78u-6(b), (g).

Finally, in its anti-retaliation provision, the section guarantees "[p]rotection of whistleblowers." 15 U.S.C. 78u-6(h)(1)(A). Specifically, it provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. *Ibid.* First, a whistleblower is protected from retaliation for "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-

6(h)(1)(A)(i). Second, a whistleblower is protected for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(ii). Third, a whistleblower is protected for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii) (citation omitted).

In 2011, the SEC issued a rule interpreting Section 78u-6. Consistent with the definition in Section 78u-6(a)(6), the rule first explains: "You are a whistleblower if * * * you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws * * * that has occurred, is ongoing, or is about to occur." 17 C.F.R. 240.21F-2(a)(1). Remarkably, however, the rule goes on to provide a different definition of "whistleblower" for purposes of the anti-retaliation provision. The rule states that, "[f]or purposes of the anti-retaliation protections afforded by Section [78u-6(h)(1)] * * * you are a whistleblower if * * * [you provide] information in a manner described in Section [78u-6(h)(1)(A)]." 17 C.F.R. 240.21F-2(b)(1)(ii). In other words, the SEC's rule defines "whistleblower" for purposes of the anti-retaliation provision not by reference to the statutory definition of "whistleblower," but rather by reference to the activity protected by that provision.

2. Petitioner is a real estate investment trust that owns, acquires, and develops data centers. Petitioner

hired respondent as a vice president of portfolio management in 2010, and it fired respondent in April 2014. App., *infra*, 3a, 14a-15a.

In November 2014, respondent filed suit against petitioner and Ellen Jacobs, a senior vice president for human resources, in the United States District Court for the Northern District of California. As relevant here, respondent alleged that, shortly before being fired, he had complained to senior management that his supervisor had eliminated some internal controls over certain corporate actions and had engaged in other misconduct, including hiding substantial cost overruns on a project in Hong Kong. It is undisputed that respondent did not report the alleged misconduct to the SEC. He nevertheless asserted in his complaint that petitioner had retaliated against him in violation of the anti-retaliation provision of the Dodd-Frank Act by firing him for, *inter alia*, making an internal report protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a.[1]

3. Petitioner moved to dismiss the Dodd-Frank Act claim. Petitioner argued that respondent was not a "whistleblower" within the meaning of the anti-retaliation provision because he did not report the alleged misconduct to the SEC; as a result, the anti-retaliation provision did not apply. App., *infra*, 13a.

The district court denied the motion. App., *infra*, 12a-47a. At the outset, the court acknowledged that the Dodd-Frank Act "defines a 'whistleblower' as 'any individual who provides * * * information relating to a violation of the securities laws *to the Commission*.'" App., *infra*, 18a-19a (quoting 15 U.S.C. 78u-6(a)(6)). The court never-

[1] Ms. Jacobs was not named as a defendant on the Dodd-Frank Act claim.

theless concluded that the language in the statutory definition was ambiguous in light of Section 78u-6(h)(1)(A)(iii), which "prohibit[s] retaliatory acts against employees who make" internal reports of securities-law violations. *Id.* at 26a. Because the court could not "find a clear and simple way to read the statutory provisions * * * in perfect harmony with one another," it deferred to the SEC's interpretation, under which an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. *Id.* at 40a.

Although the district court denied petitioner's motion to dismiss, it certified its order for interlocutory review under 28 U.S.C. 1292(b). App., *infra*, 46a-47a. The court recognized that there was a "serious split in authority" on the issue, with the Fifth Circuit, the only court of appeals to have considered the question at that time, unanimously reaching the opposite conclusion. D. Ct. Dkt. 61, at 4 (July 22, 2015) (citing *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)).

4. The court of appeals granted interlocutory review. While the appeal was pending, a divided panel of the Second Circuit issued an opinion disagreeing with the Fifth Circuit and holding that an individual who makes an internal disclosure under the Sarbanes-Oxley Act is a "whistleblower" for purposes of the anti-retaliation provision. See *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). Judge Jacobs dissented. See *id.* at 155.

The SEC filed an amicus brief in the court of appeals supporting respondent and defending its rule interpreting Section 78u-6. See SEC C.A. Br. 19-37. The SEC also participated in oral argument.

5. A divided panel of the court of appeals affirmed. App., *infra*, 1a-11a.

a. The court of appeals began by acknowledging that the question presented "has divided the federal district and circuit courts." App., *infra*, 1a. It recognized that Section 78u-6(a)(6) defines a "whistleblower" as an individual who "provides * * * information relating to a violation of the securities laws to the Commission." *Id.* at 5a. But the court reasoned that the definition of "whistleblower" "should not be dispositive of the scope of [the Dodd-Frank Act's] later anti-retaliation provision," because "[t]erms can have different operative consequences in different contexts." *Id.* at 7a (citing *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). According to the court, "[s]tatutory definitions are * * * just one indication of meaning," and the anti-retaliation provision "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at 7a-8a (internal quotation marks, brackets, and citation omitted).

A contrary interpretation, the court of appeals continued, would "make little practical sense and undercut congressional intent." App., *infra*, 8a. In the court's view, applying the statutory definition of "whistleblower" would "narrow[] [clause (iii)] to the point of absurdity," on the ground that only individuals who made both internal reports and reports to the SEC would be covered. *Ibid.* The court, however, believed that a broader interpretation was necessary to "give effect to all statutory language." *Ibid.*

For that reason, the court of appeals concluded that the anti-retaliation provision "should be read to provide protections to those who report internally as well as those who report to the SEC." App., *infra*, 10a. The court added that, "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term," the SEC's

interpretation was entitled to deference. *Ibid.* The court reasoned that the SEC's interpretation "accurately reflects Congress's intent to provide broad whistleblower protections under [the Dodd-Frank Act]." *Ibid.* After reviewing the "intercircuit disagreement" on the question presented, the court of appeals ultimately agreed with the Second Circuit's reasoning in *Berman*. *Id.* at 9a-10a.

b. Judge Owens dissented. App., *infra*, 11a. He indicated he would have held that the anti-retaliation provision reaches only individuals who fall within the Act's definition of "whistleblower," based on the reasoning of the Fifth Circuit in *Asadi* and Judge Jacobs' dissent in *Berman*. *Ibid.* He added that, to the extent the majority relied on this Court's decision in *King*, "we should quarantine *King* * * * to the specific facts of that case." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and recurring question involving the interpretation of the Dodd-Frank Act. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the anti-retaliation provision for "whistleblowers" extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." Three courts of appeals and at least two dozen district courts have weighed in on that issue. One court of appeals has held that the anti-retaliation provision reaches only individuals who qualify as "whistleblowers." Two courts of appeals, including the court below, have held (over dissents) that the anti-retaliation provision applies to all individuals, regardless of whether they qualify as "whistleblowers" under the statutory definition.

That conflict cries out for the Court's review, and this case is an optimal vehicle in which to resolve it. The arguments on both sides of the conflict are well developed, having been aired in dozens of opinions. The question presented is one of substantial legal and practical importance, potentially affecting every publicly traded company. And this case presents the question squarely and cleanly. Because this case readily satisfies the criteria for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a preexisting conflict among the federal courts of appeals concerning the scope of the Dodd-Frank Act's anti-retaliation provision.

1. a. As the Ninth Circuit noted (App., *infra*, 2a), the first appellate decision addressing the question presented was the Fifth Circuit's unanimous decision in *Asadi* v. *G.E. Energy (USA), LLC*, 720 F.3d 620 (2013). The plaintiff in that case alleged that his former employer had violated the Dodd-Frank Act's anti-retaliation provision by firing him for internally reporting a possible violation of the Foreign Corrupt Practices Act. See *id.* at 621. There, as here, it was undisputed that the plaintiff had not brought those allegations to the SEC's attention. See *id.* at 624.

The Fifth Circuit held that the district court had correctly dismissed the plaintiff's claim under the anti-retaliation provision. See 720 F.3d at 630. The Fifth Circuit's analysis "start[ed] and end[ed] * * * with the text of the relevant statute." *Id.* at 623. The Act, the court explained, defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the

securities laws *to the Commission*." *Ibid.* (citation omitted). "[S]tanding alone," that definition "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower.'" *Ibid.*

The Fifth Circuit next turned to the anti-retaliation provision. That provision, the court observed, "clearly answers two questions: (1) who is protected; and (2) what actions by protected individuals constitute protected activity." 720 F.3d at 625. "First, and most critically to this appeal, the answer to the first question is 'a whistleblower.'" *Ibid.* "[T]he answer to the latter question," the court continued, "is 'any lawful act done by the whistleblower' that falls within one of the three categories of action described in the statute." *Ibid.*

The Fifth Circuit rejected the plaintiff's argument that its construction would render clause (iii) of the anti-retaliation provision superfluous. See 720 F.3d at 626-628. To begin with, the court explained, there would be conflict between the definition of a "whistleblower" and clause (iii) only "if [the court] read the three categories of protected activity [in Section 78u-6(h)(1)(A)] as additional definitions of three types of whistleblowers." *Id.* at 626. But the statute explicitly defines a "whistleblower": namely, an individual who reports to the SEC. See *ibid.* And the anti-retaliation provision specifies that no one may retaliate against a "whistleblower." See *ibid.* The Fifth Circuit reasoned that, because Congress used that specific term instead of more general language such as "individual" or "employee," the court "must give that [term] effect." *Id.* at 626-627. The court explained that clause (iii) was not superfluous under its interpretation because it would protect an individual who had reported alleged misconduct both internally and to the SEC but was fired because of the internal report. See *id.* at 627.

To the contrary, the Fifth Circuit observed, a different rule would render the statute's definition of "whistleblower" surplusage, and would also render the anti-retaliation provision of the Sarbanes-Oxley Act, which does not require a report to the SEC, "for practical purposes[] moot." 720 F.3d at 628. Because the Fifth Circuit held that the statute was unambiguous, it concluded that deference to the SEC's interpretation was unwarranted. See *id.* at 629-630.

b. Numerous district courts nationwide have followed the Fifth Circuit, citing *Asadi* and holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Deykes* v. *Cooper-Standard Automotive, Inc.*, Civ. No. 16-11828, 2016 WL 6873395, at *2-*4 (E.D. Mich. Nov. 22, 2016); *Lamb* v. *Rockwell Automation Inc.*, Civ. No. 15-1415, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016); *Puffenbarger* v. *Engility Corp.*, 151 F. Supp. 3d 651, 663-665 (E.D. Va. 2015); *Verble* v. *Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015), aff'd on other grounds, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), cert. denied, No. 16-946 (Mar. 20, 2017); *Duke* v. *Prestige Cruises International, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015); *Verfuerth* v. *Orion Energy Systems, Inc.*, 65 F. Supp. 3d 640, 643-646 (E.D. Wis. 2014); *Englehart* v. *Career Education Corp.*, Civ. No. 14-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Wagner* v. *Bank of America Corp.*, Civ. No. 12-381, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013), aff'd on other grounds, 571 Fed. Appx. 698 (10th Cir. 2014).

2. a. A divided panel of the Second Circuit reached the opposite conclusion in *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145 (2015). The plaintiff in that case alleged that he was fired for internally reporting accounting fraud.

See *id.* at 149. Again, it was undisputed that the plaintiff did not report the alleged misconduct to the SEC prior to his termination. See *ibid.*

The district court dismissed the plaintiff's claim under the anti-retaliation provision, but the Second Circuit, over a dissent from Judge Jacobs, reversed. See 801 F.3d at 155. The Second Circuit characterized the case as presenting "the recurring issue of statutory interpretation that arises when express terms in one provision of a statute are arguably in tension with language in another provision of the same statute." *Id.* at 146. According to the Second Circuit, this Court "recently encountered a similar issue" in *King*. *Ibid.*

Relying heavily on *King*, the Second Circuit proceeded to consider the scope of the anti-retaliation provision. The court recognized that "there is no absolute conflict between the Commission notification requirement in the definition of 'whistleblower' and the absence of such a requirement" elsewhere in the Dodd-Frank Act. 801 F.3d at 150-151 (citing *Asadi*, 720 F.3d at 627-628). The court contended, however, that there was a "significant tension" between those provisions, and it reasoned that applying the definition of a "whistleblower" to the anti-retaliation provision would leave clause (iii) with an "extremely limited scope." *Id.* at 151. The court suggested that whistleblowers who report alleged misconduct both internally and to the SEC are "likely to be few in number," *ibid.*, and some whistleblowers would not be permitted to report alleged misconduct to the SEC until after they have reported it internally, see *id.* at 151-152.

In light of what it perceived as the "sharply limiting effect of a Commission reporting requirement," the Second Circuit believed that "the question becomes whether Congress intended to add [clause (iii)] * * * only to achieve such a limited result." 801 F.3d at 152. The court

acknowledged that legislative history shed no light on the issue, because clause (iii) was added after the bill passed through committee both in the House and in the Senate. See *id.* at 152-153. The court further acknowledged that "the terms of a definitional subsection are usually to be taken literally * * * [and] applied to all subdivisions literally covered by the definition." *Id.* at 154.

The Second Circuit nevertheless reasoned that "mechanical use of a statutory definition is not always warranted." 801 F.3d at 154 (internal quotation marks and citation omitted). Taking into account the "realities of the legislative process," the court determined that the statute was ambiguous. *Id.* at 154-155. The court "doubt[ed] that the conferees who accepted the last-minute insertion of [clause (iii)] would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition in [Section 78u-6(a)(6)]." *Id.* at 155. For that reason, the court concluded that, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it was "oblige[d] * * * to give * * * deference to the reasonable interpretation of the agency charged with administering the statute." 801 F.3d at 155.

Judge Jacobs dissented. He contended that "our obligation is to apply congressional statutes as written" and that the majority's "alteration" of the statutory text "creates a circuit split[] and places us firmly on the wrong side of it." 801 F.3d at 155. In Judge Jacobs' view, the majority's approach "looks here, there and everywhere—except to the statutory text." *Id.* at 158. Judge Jacobs rejected the majority's assertion that clause (iii) would have an unduly narrow scope under the statutory definition of "whistleblower." See *ibid.* But even accepting that assertion, Judge Jacobs reasoned that there was "no support" for the proposition that "when a plain reading of a statutory

provision gives it an 'extremely limited' effect, the statutory provision is impaired or ambiguous." *Ibid.* "The thing about a definition is that it is, well, definitional." *Ibid.*

Finally, Judge Jacobs asserted that *King* "does not do the work the majority needs done." 801 F.3d at 159. In his view, *King* did not work a "wholesale revision of the Supreme Court's statutory interpretation jurisprudence." *Ibid.* Instead, to the extent the Court "departed from the plain statutory text" in *King*, it did so under "most unusual circumstances": namely, "to avoid what it considered the upending of a ramified, hugely consequential enactment." *Ibid.* In any event, Judge Jacobs continued, the Court emphasized in *King* that "categorical guidance as to congressional intent should better be looked for in a more predictable location—*like a definitions section.*" *Id.* at 160 (citing *King*, 135 S. Ct. at 2495). "In our case," Judge Jacobs concluded, "the majority follows the sort of 'winding path of connect-the-dots provisions' that the Supreme Court ridiculed." *Ibid.*[2]

b. Numerous district courts nationwide have reached the same conclusion as the Second Circuit, holding that an individual need not report alleged misconduct to the SEC to qualify as a "whistleblower" for purposes of Section 78u-6(h)(1)(A). See, *e.g.*, *Lutzeier* v. *Citigroup Inc.*, Civ. No. 14-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015); *Dressler* v. *Lime Energy*, Civ. No. 14-7060, 2015 WL 4773326, at *16 (D.N.J. Aug. 13, 2015); *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014); *Khazin* v. *TD Ameritrade Holding Corp.*, Civ. No. 13-4149, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014),

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[2] The defendants in *Berman* did not file a petition for a writ of certiorari.

aff'd on other grounds, 773 F.3d 488 (3d Cir. 2014); *Ellington* v. *Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Genberg* v. *Porter*, 935 F. Supp. 2d 1094, 1107 (D. Colo. 2013), aff'd in part on other grounds and dismissed in part, 566 Fed. Appx. 719 (10th Cir. 2014); *Nollner* v. *Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994-995 (M.D. Tenn. 2012).[3]

3. In the decision below, the Ninth Circuit expressly recognized the existence of a circuit conflict on the question presented. App., *infra*, 9a. And it ultimately agreed with the Second Circuit's reasoning in *Berman* and rejected the Fifth Circuit's reasoning in *Asadi*. *Id.* at 9a-10a. In his dissent, by contrast, Judge Owens adopted the reasoning of *Asadi* and of Judge Jacobs' dissent in *Berman*. *Id.* at 11a. There can be no serious dispute, therefore, that there is a substantial circuit conflict on the question presented. That conflict is ripe for the Court's resolution, and further review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a question with significant practical consequences for employers and employees alike. Employees frequently allege misconduct both to the SEC and internally. In 2016 alone, the SEC received over 4,200 reports of misconduct. See SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 1

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[3] Notably, before *Berman* and the decision below, district courts in the Second and Ninth Circuits had reached the same conclusion as the Fifth Circuit in *Asadi*, holding that an individual must report alleged misconduct to the SEC to qualify as a "whistleblower." See *Davies* v. *Broadcom Corp.*, 130 F. Supp. 3d 1343, 1349-1350 (C.D. Cal. 2015); *Wiggins* v. *ING U.S., Inc.*, Civ. No. 14-1089, 2015 WL 3771646, at *11 (D. Conn. June 17, 2015); *Sarkisov* v. *Stonemor Partners L.P.*, Civ. No. 13-4834, 2014 WL 12644016, at *4 (N.D. Cal. June 25, 2014); *Banko* v. *Apple Inc.*, 20 F. Supp. 3d 749, 757 (N.D. Cal. 2013).

(Nov. 2016) <tinyurl.com/doddfrankreport>. For their part, in 2015, employers received around 1.3 reports of misconduct per 100 employees. See Navex Global, *2016 Ethics & Compliance Hotline Benchmark Report* 4 (2016) <tinyurl.com/navexreport>.

In light of the frequency with which employees allege misconduct, it is not surprising that the question presented here also arises often. As reflected by the enormous number of conflicting decisions in the seven years since the passage of the Dodd-Frank Act, there is pervasive confusion about the scope of the anti-retaliation provision that the lower courts are unlikely to resolve on their own. Numerous commentators have recognized the deepening conflict and the need for this Court's intervention. See, *e.g.*, Janna Mouret, Comment, *Shelter from the Retaliation Storm*, 52 Hous. L. Rev. 1529, 1549 (2015); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 Temp. L Rev. 721, 726 (2014); Joseph C. Toris & Benjamin L. Rouder, *Circuit Split Over Protection Afforded By Dodd-Frank Whistleblower Provision Widens*, Nat'l L. Rev. (Mar. 16, 2017) <tinyurl.com/splitwidens>.

2. If allowed to stand, the decision below, from the Nation's largest circuit, will have pernicious consequences for every publicly traded company. That decision deepens the confusion regarding the relationship between the two primary anti-retaliation protections available to corporate whistleblowers under federal law: the Sarbanes-Oxley Act and the Dodd-Frank Act. As this Court recently observed, those statutes protect different categories of whistleblowers. The Sarbanes-Oxley Act's "protections include employees who provide information to any 'person with supervisory authority over the employee,'" whereas

the anti-retaliation provision of the Dodd-Frank Act "focuses primarily on reporting to federal authorities." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014) (citation omitted).

The Ninth Circuit's decision in this case threatens to upset that balance, essentially rendering obsolete the Sarbanes-Oxley Act's anti-retaliation scheme. That is because the Dodd-Frank Act affords whistleblowers several distinct advantages that the Sarbanes-Oxley Act does not. For example, the Dodd-Frank Act allows whistleblowers to bring a retaliation claim in district court in the first instance. See 15 U.S.C. 78u-6(h)(1)(B)(i). Under the Sarbanes-Oxley Act, however, whistleblowers must exhaust their administrative remedies by filing a complaint with the Department of Labor; the whistleblower may pursue a retaliation claim in federal court only if the Department of Labor does not issue a final decision within 180 days of the filing of the administrative complaint. See 18 U.S.C. 1514A(b)(1). Whistleblowers can seek double backpay under the Dodd-Frank Act, but not under the Sarbanes-Oxley Act. Compare 15 U.S.C. 78u-6(h)(1)(C) (Dodd-Frank Act) with 18 U.S.C. 1514A(c)(2) (Sarbanes-Oxley Act). And the limitations period for Dodd-Frank Act claims is between six and ten years, see 15 U.S.C. 78u-6(h)(1)(B)(iii), whereas the corresponding period under the Sarbanes-Oxley Act is just six months, see 18 U.S.C. 1514A(b)(2)(D).

This case well illustrates the danger that the anti-retaliation provision of the Dodd-Frank Act will effectively supplant its counterpart in the Sarbanes-Oxley Act. Respondent alleged that he was fired for, *inter alia*, making internal reports under the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. Rather than exhausting his administrative remedies as the Sarbanes-Oxley Act requires, how-

ever, respondent proceeded directly to federal court under the Dodd-Frank Act. Nor is respondent the only plaintiff to have taken that approach: the vast majority of the plaintiffs in the dozens of other cases addressing the question presented did the same. See pp. 10-16, *supra*. Absent this Court's intervention, individuals who have not reported alleged misconduct to the SEC will be able to proceed under the Dodd-Frank Act in some circuits (and districts), but not in others. That will undermine the consistency and clarity critical to both employers and employees.

3. This case is an optimal vehicle for considering and resolving such an important question. As a result of the allegations and posture of this case, the question is presented cleanly and squarely. Respondent alleges that he made an internal disclosure protected by the Sarbanes-Oxley Act. App., *infra*, 3a, 14a-15a. If respondent had reported the alleged misconduct to the SEC, he would have qualified as a "whistleblower" eligible to bring an anti-retaliation claim under the Dodd-Frank Act. It is undisputed, however, that respondent reported the misconduct only internally and not to the SEC. *Id.* at 15a. The question presented is thus dispositive of respondent's claim under the Dodd-Frank Act. That question was exhaustively briefed by the parties and the SEC below, and it was the sole question addressed by the court of appeals in its opinion. And by agreement of the parties, the district court recently stayed any further proceedings in the case pending the Court's disposition of this petition. See D. Ct. Dkt. 210 (Apr. 11, 2017).

Finally, there would be no material benefit to additional percolation in the lower courts. The arguments for both sides have been exhaustively developed in the three court of appeals decisions (two with dissents) and the more than two dozen district-court decisions addressing

the question presented. Even if it were otherwise, the pressing need for consistency and clarity in the law would outweigh any benefit from further percolation.

* * * * *

In sum, the Ninth Circuit's decision deepens a widely recognized conflict on the question whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Act extends to individuals who have not reported alleged misconduct to the SEC and thus fall outside the Act's definition of a "whistleblower." That question is an important and recurring one, and this case is the ideal vehicle for resolving it. Further review is undeniably warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-17352

PAUL SOMERS, Plaintiff-Appellee,

v.

DIGITAL REALTY TRUST INC., a Maryland corporation; ELLEN JACOBS, Defendants-Appellants.

Filed: March 8, 2017

Before: SCHROEDER, WARDLAW, and OWENS, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge.

INTRODUCTION

This appeal presents an issue of securities law that has divided the federal district and circuit courts. It results from a last-minute addition to the anti-retaliation protections of the Dodd-Frank Act ("DFA") to extend protection to those who make disclosures under the Sarbanes-Oxley Act and other laws, rules, and regulations. 15 U.S.C.

§ 78u-6(h)(1)(A)(iii). The underlying issue is whether, in using the term "whistleblower," Congress intended to limit protections to those who come within DFA's formal definition, which would include only those who disclose information to the Securities and Exchange Commission ("SEC"). *See* 15 U.S.C. § 78u-6(a)(6). If so, it would exclude those, like the plaintiff in this case, who were fired after making internal disclosures of alleged unlawful activity.

The Fifth Circuit was the first to weigh in on the question and strictly applied DFA's definition of "whistleblower" to the later anti-retaliation provision, so as to require dismissal of the plaintiff's action in that case because he did not make his disclosures to the SEC. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013). It therefore rejected the SEC's regulation adopting a contrary interpretation. *Id.* at 630.

The Second Circuit, viewing the statute itself as ambiguous, applied *Chevron* deference to the SEC's regulation. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). That regulation, in effect, interprets the provision to extend protections to all those who make disclosures of suspected violations, whether the disclosures are made internally or to the SEC. 17 C.F.R. § 240.21F-2.

The district court in this case followed the Second Circuit's approach, denied Defendant's motion to dismiss, and certified an interlocutory appeal. We agree with the district court that the regulation is consistent with Congress's overall purpose to protect those who report violations internally as well as those who report to the government. This intent is reflected in the language of the spe-

cific statutory subdivision in question, which explicitly references internal reporting provisions of Sarbanes-Oxley and the Securities Exchange Act of 1934 ("Exchange Act"). In view of that language, and the overall operation of the statute, we conclude that the SEC regulation correctly reflects congressional intent to provide protection for those who make internal disclosures as well as to those who make disclosures to the SEC. We therefore affirm.

BACKGROUND

Plaintiff-Appellee, Paul Somers, was employed as a Vice President by Defendant-Appellant, Digital Realty Trust, Inc. ("Digital Realty"), from 2010 to 2014. According to Somers's complaint in district court, he made several reports to senior management regarding possible securities law violations by the company, soon after which the company fired him. Somers was not able to report his concerns to the SEC before Digital Realty terminated his employment.

Somers subsequently sued Digital Realty, alleging violations of various state and federal laws, including Section 21F of the Exchange Act. That section, entitled "Securities Whistleblower Incentives and Protection," includes the anti-retaliation protections created by DFA. Digital Realty sought to dismiss the DFA claim on the ground that, because Somers only reported the possible violations internally and not to the SEC, he was not a "whistleblower" entitled to DFA's protections.

The district court, in a published opinion, denied Digital Realty's motion to dismiss the DFA claim. The court conducted an extensive analysis of the statutory text, DFA's legislative history, and the procedural and practical implications of harmonizing the narrow definition of

whistleblower" with the broad protections of the anti-retaliation provision. *Somers v. Dig. Realty Tr. Inc.*, 119 F. Supp. 3d 1088, 1100-05 (N.D. Cal. 2015). The court observed that "[a]t bottom, it is difficult to find a clear and simple way to read the statutory provisions of Section 21F in perfect harmony with one another." *Id.* at 1104. Having analyzed the tension between the definition and anti-retaliation provisions, the district court deferred to the SEC's interpretation that individuals who report internally only are nonetheless protected from retaliation under DFA. *Id.* at 1106. The district court certified the DFA question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), *id.* at 1108, and we subsequently granted Digital Realty's Petition for Permission to Appeal.

DISCUSSION

The case must be seen against the background of twenty-first century statutes to curb securities abuses. Congress enacted the Sarbanes-Oxley Act in 2002, following a major financial scandal. Its purpose was "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014). As a key part of its safeguards, Sarbanes-Oxley requires internal reporting by lawyers working for public companies. *See* 15 U.S.C. § 7245. This is in addition to internal reporting by auditors, which was already mandated by the Exchange Act. *See* 15 U.S.C. § 78j-1(b). Further, Sarbanes-Oxley requires that companies maintain internal compliance systems that include procedures for employees to anonymously report concerns about accounting or auditing matters. *See* 15 U.S.C. § 78-j-1(m)(4), 7262. It also provides protections to these and other "whistleblower" employees in the event that companies retaliate

against them. 18 U.S.C. § 1514A(a). Sarbanes-Oxley expressly protects those who lawfully provide information to federal agencies, Congress, or "a person with supervisory authority over the employee." *Id.*

Like Sarbanes-Oxley, DFA was passed in the wake of a financial scandal—the subprime mortgage bubble and subsequent market collapse of 2008. *See* Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 MICH. L. REV. 121, 129-30 (2014) (discussing the mortgage crisis and Congress's response). In enacting DFA, Congress said the main purposes included "promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system" and "protect[ing] consumers from abusive financial services practices." Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). DFA provided new incentives and employment protections for whistleblowers by adding Section 21F to the Securities Exchange Act of 1934. Section 21F defines a whistleblower as, "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). This definition thus describes only those who report information to the SEC.

The anti-retaliation provision in question in this case is found in a later subsection of Section 21F. It provides broad protections and states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment

> because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A). The issue in this case concerns subdivision (iii), which gives whistleblower protection to all those who make any required or protected disclosure under Sarbanes-Oxley and all other relevant laws.

Subdivision (iii) was added after the bill went through Committee. There is no legislative history explaining its purpose, but its language illuminates congressional intent. By broadly incorporating, through subdivision (iii), Sarbanes-Oxley's disclosure requirements and protections, DFA necessarily bars retaliation against an employee of a public company who reports violations to the boss, i.e., one who "provide[s] information" regarding a securities law violation to "a person with supervisory authority over the employee." 18 U.S.C. § 1514A(a). Provisions of Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting. Auditors, for

example, must "as soon as practicable, inform the appropriate level of management" of illegal acts, and only after such internal reporting may auditors bring their concerns to the SEC. 15 U.S.C. § 78j-1(b). Leaving employees without protection for that required preliminary step would result in early retaliation before the information could reach the regulators. As the Second Circuit noted, "[I]f subdivision (iii) requires reporting to the [SEC], its express cross-reference to the provisions of Sarbanes-Oxley would afford an auditor almost no Dodd-Frank protection for retaliation because the auditor must await a company response to internal reporting before reporting to the Commission, and any retaliation would almost always precede Commission reporting." *Berman*, 801 F.3d at 151. Sarbanes-Oxley likewise requires lawyers to report internally, 15 U.S.C. § 7245, and the SEC's Standards of Professional Conduct set forth only limited instances in which an attorney may reveal client confidences to the SEC, 17 C.F.R. § 205.3(d)(2). The attorney would be left with little DFA protection.

That DFA's definitional provision describes "whistleblowers" as employees who report "to the Commission" thus should not be dispositive of the scope of DFA's later anti-retaliation provision. Terms can have different operative consequences in different contexts. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The use of a term in one part of a statute "may mean [a] different thing[]" in a different part, depending on context. *See id.* at 2493 n.3. This is true even where, as here, the statute includes a definitional provision: "[Statutory d]efinitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 228

(2012). DFA's anti-retaliation provision unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally. *See King*, 135 S. Ct. at 2493 n.3. Its terms should be enforced.

Reading the use of the word "whistleblower" in the anti-retaliation provision to incorporate the earlier, narrow definition would make little practical sense and undercut congressional intent. As the Second Circuit pointed out, subdivision (iii) would be narrowed to the point of absurdity; the only class of employees protected would be those who had reported possible securities violations both internally and to the SEC, when the employer—unaware of the report to the SEC—fires the employee solely on the basis of the employee's internal report. *See Berman*, 801 F.3d at 151-52. This reading is illogical. Employees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally. *See id.* Reporting to the SEC brings a higher likelihood of a problem being addressed, along with an increased risk of employer retaliation, whereas internal reporting may be less efficient but safer. *Id.* As we have seen, Sarbanes-Oxley and the Exchange Act prohibit potential whistleblowers—auditors and lawyers—from reporting to the SEC until after they have reported internally. *Id.* at 152-53. The anti-retaliation provision would do nothing to protect these employees from immediate retaliation in response to their initial internal report. A strict application of DFA's definition of whistleblower would, in effect, all but read subdivision (iii) out of the statute. We should try to give effect to all statutory language. *See Duncan v. Walker*, 174, 121 S. Ct. 2120, (2001) (rejecting a statutory construction that would render a term "insignificant, if not wholly superfluous"); *see*

also Nat. Res. Def. Council, Inc. v. Pritzker, 828 F.3d 1125, 1133 (9th Cir. 2016).

We recognize there is intercircuit disagreement. The Second Circuit in *Berman* disagreed with the Fifth Circuit, which had earlier applied the formal definition of whistleblower to limit the scope of the anti-retaliation provision. *Asadi*, 720 F.3d at 630. The *Asadi* decision reasoned that if DFA protected the same conduct that Sarbanes-Oxley did, then the Sarbanes-Oxley enforcement scheme would be rendered moot or superfluous, on the theory that no one would use it. *See id.* at 628-29. The Fifth Circuit pointed out that Sarbanes-Oxley lacks DFA's double damage provision, has a shorter statute of limitations, and has more extensive administrative requirements. *Id.* But as the SEC has pointed out in its amicus brief in this case, DFA's enforcement scheme is not more protective in all situations and would not swallow Sarbanes-Oxley because Sarbanes-Oxley offers a different process from DFA. Sarbanes-Oxley may be more attractive to the whistleblowing employee in at least two important ways. First, Sarbanes-Oxley provides for adjudication through administrative review, with the Department of Labor taking responsibility for asserting the claim on the whistleblower's behalf. 18 U.S.C. § 1514A (b)(2). This procedure would likely be significantly less costly and stressful for whistleblowers than having to file an action in federal court, pursuant to DFA's enforcement scheme. *See* 15 U.S.C. § 78u-6(h)(1)(B). Second, while DFA provides for awards of double back pay, 15 U.S.C. § 78u-6(h)(1)(C), Sarbanes-Oxley allows employees to recover "all relief necessary to make the employee whole," including compensation for special damages, 18 U.S.C. § 1514A(c). An employee who has suffered more substantial emotional injury than financial harm would likely be

better off with Sarbanes-Oxley's allowance for special damages. *See Jones v. SouthPeak Interactive Corp.*, 777 F.3d 658, 672 (4th Cir. 2015) (joining the Fifth and Tenth Circuits in concluding that emotional distress damages are available under Sarbanes-Oxley as "special damages"). DFA's protection for internal reporting therefore does not render Sarbanes-Oxley's enforcement scheme superfluous. The statutes provide alternative enforcement mechanisms.

For all these reasons, we conclude that subdivision (iii) of section 21F should be read to provide protections to those who report internally as well as to those who report to the SEC. We also agree with the Second Circuit that, even if the use of the word "whistleblower" in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term, the agency responsible for enforcing the securities laws has resolved any ambiguity and its regulation is entitled to deference. In 2011, the SEC issued Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2, pursuant to its rule-making authority under 15 U.S.C. § 78u-6(j). The SEC's rule in our view accurately reflects Congress's intent to provide broad whistleblower protections under DFA. The Rule says that anyone who does any of the things described in subdivisions (i), (ii), and (iii) of the anti-retaliation provision is entitled to protection, including those who make internal disclosures under Sarbanes-Oxley. They are all whistleblowers. The Rule is quite direct: "For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if: . . . [y]ou provide that information in a manner described in [the anti-retaliation provision] of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A))." 17 C.F.R. § 240.21F-2.

The regulation accurately reflects congressional intent that DFA protect employees whether they blow the whistle internally, as in many instances, or they report directly to the SEC. The district court correctly so recognized.

The judgment of the district court is **AFFIRMED.**

OWENS, Circuit Judge, dissenting:

I agree with the Fifth Circuit in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 621 (5th Cir. 2013), and Judge Jacobs' dissent in *Berman v. Neo @Ogilvy LLC*, 801 F.3d 145, 155-60 (2d Cir. 2015), and therefore respectfully dissent. Both the majority here and the Second Circuit in *Berman* rely in part on *King v. Burwell*, 135 S. Ct. 2480 (2015), to read the relevant statutes in favor of the government's position. In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level. *Cf. John Carpenter's The Thing* (Universal Pictures 1982).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-14-5180 EMC

PAUL SOMERS, Plaintiff,

v.

DIGITAL REALTY TRUST, INC., *et al.*, Defendants.

Signed: July 22, 2015

AMENDED ORDER DENYING (1) DEFENDANT'S MOTION TO DISMISS; (2) PLAINTIFF'S MOTION TO DISQUALIFY DEFENSE COUNSEL

CHEN, United States District Judge.

I. INTRODUCTION

Plaintiff Paul Somers brought this lawsuit against his former employer, Digital Realty Trust, and Ellen Jacobs, a Senior Vice President at Digital Realty Trust (collectively, Digital Realty, or Defendants). *See* Docket No. 1 (Complaint); *see also* Docket No. 38 (Ellen Jacobs Decl.) at ¶ 2. While Somers' complaint pleads five separate causes of action, including claims for discrimination on the

basis of his sexual orientation and defamation, Digital Realty's current motion to dismiss challenges only one cause of action: that Digital Realty violated the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank, or DFA) where it allegedly terminated Somers' employment in retaliation for his making internal reports of securities law violations. *See* Complaint at ¶¶ 44-51; Docket No. 20 (Motion to Dismiss). Specifically, Digital Realty argues that Somers' Dodd-Frank claim fails as a matter of law because Somers doesn't qualify as a "whistleblower" under the statute.[1] For the reasons explained below, Digital Realty appears mistaken. The Securities and Exchange Commission (SEC, or Commission) has formally issued a rule that clarifies the scope and meaning of the whistleblower protections of Dodd-Frank, and extends the protection of those provisions to individuals like Somers who report suspected violations not to the SEC, but to internal management. Because the Court finds that the SEC's rule is entitled to *Chevron* deference, Digital Realty's motion to dismiss is **DENIED**.

Also pending before the Court is Somers' motion to disqualify Defendants' counsel, Seyfarth Shaw, for a purported conflict of interest. Because Seyfarth Shaw's prior representation of Somers—for a total of 2.1 hours of billable time—is not "substantially related" to its current

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[1] Digital Realty also argued that Somers could not maintain a cause of action for whistleblower retaliation under the Sarbanes-Oxley Act directly because Somers did not exhaust his administrative remedies. Somers states in his opposition brief that he did not plead or intend to bring a Sarbanes-Oxley whistleblower claim, *see* Docket No. 21 at 1, and so Defendants' motion to dismiss any such claim is currently unripe.

successive representation of the Defendants, disqualification is not appropriate. This motion is also **DENIED**.

II. BACKGROUND

A. *Background Relevant to Digital Realty's Motion to Dismiss*

Somers was hired by Digital Realty in July 2010. Complaint at ¶ 10. According to Plaintiff, Digital Realty "operates as a real estate investment trust" that "owns, acquires, develops and manages technology-related real estate." Complaint at ¶ 13.

Somers worked as a Vice President of Portfolio Management at Digital Realty, first in Europe and then in Singapore. *Id.* at ¶¶ 10, 15. In Singapore, Somers reported to Senior Vice President Kris Kumar, who headed up the Asian Pacific region for Digital Realty. *Id.* at ¶ 15. "Shortly before Plaintiff's wrongful termination by Defendant Digital, Plaintiff made complaints to senior management regarding actions by Kumar which eliminated internal controls over certain corporate actions in violation of Sarbanes Oxley." *Id.* at ¶ 22; *see also id.* at ¶ 46 ("Plaintiff complained to Defendant Digital's officers, directors, and/or managing agents that certain of Kumar's activities violated requirements for internal controls established by [] the Sarbanes-Oxley Act of 2002."). According to Somers, Kumar had committed a number of acts of "serious misconduct," including "hiding [] seven million dollars in cost overruns on a development in Hong Kong." *Id.* at ¶ 27.

Somers was fired by Digital Realty on April 9, 2014. According to Somers, he was fired (at least in part) in re-

taliation for internally reporting Kumar's alleged violation(s) of Sarbanes-Oxley or other applicable laws. *See* Complaint at ¶ 50. It is undisputed that Somers never reported Kumar's alleged violations to the SEC or any other outside enforcement agency. *See* Docket No. 21 (Plaintiff's Opposition to Motion to Dismiss) at 2.

B. *Background Relevant to Somers' Motion to Disqualify*

Before going to work for Digital Realty, Plaintiff was represented by a partner at Seyfarth Shaw, Eugene Jacobs.[2] Docket No. 34 (Somers Decl.) at ¶ 2. According to Mr. Jacobs, he gave a presentation on April 20, 2010, to executive clients of "Kensington International, an executive recruiting and placement firm." Docket No. 39 (Eugene Jacobs Decl.) at ¶ 3. At the April 20 presentation, Mr. Jacobs "prepared a standard discussion outline called 'Executive Employment Agreement Issues for Consideration' that contains a general overview of issues and discussion points for things to consider when negotiating executive employment agreements." *Id.* at ¶ 4. A copy of the outline indicates that the topics discussed at the April 20 meeting included how to negotiate a new executive's title with the hiring company, executive benefits, and termination provisions. *Id.* at Ex. A.

Sometime after the presentation, Mr. Jacobs avers that he was contacted by Susan Duda, an executive coach at Kensington International, asking for an additional copy of the discussion handout, "presumably so she could share it with [her client] Mr. Somers." Eugene Jacobs Decl. at

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[2] Mr. Jacobs is not related to Defendant Ellen Jacobs. Ellen Jacobs Decl. at ¶ 10.

¶ 7. Jacobs sent Duda the discussion handout. *Id.* Two days later, Ms. Duda "sent Mr. Somers' resume to me and told me that he may contact me about legal representation. Later that day, Mr. Somers engaged me to provide legal advice regarding his potential employment agreement with Newcastle Limited, a Chicago-based real estate advisor and investor." *Id.* at ¶ 8. According to Mr. Jacobs' time records from April 22, 2010, he spent .8 hours on a "[t]elephone conference [with] P. Somers regarding employment matter issues and strategies." Somers Decl., Ex. A (Bill from Seyfarth Shaw to Somers).

On April 26, Mr. Jacobs contends that Somers "sent me documents that Newcastle had sent him about the position for which he interviewed, including an offer letter template, job description, and summary of employee benefits available to Newcastle employees." Eugene Jacobs Decl. at ¶ 10. Mr. Jacobs' time records indicate that he conducted a 1.3 hour-long telephone conference with Somers that day to "review Newcastle offer letter and related documents; identify issues." Somers Decl., Ex. A. These two telephone conferences, lasting 2.1 hours in total, are the only legal work Jacobs (and Seyfarth Shaw) performed for Somers. *See* Somers Decl. at ¶ 5.

According to Jacobs, he next heard from Somers on April 30, when Somers "advised me that his negotiations with Newcastle had stalled." Eugene Jacobs Decl. at ¶ 11. Somers then "emailed [Jacobs] out of the blue" in June 2010 to tell him "that he had already accepted a position with Digital Realty Trust." Eugene Jacobs Decl. at ¶ 12. According to Jacobs, he "had no input whatsoever in any negotiations, if there were any, or other terms and conditions relating to Mr. Somers' employment with Digital Realty." Jacobs further declares that:

> Mr. Somers never sought any legal advice of any nature from me in connection with the job at Digital Realty, nor did I provide any legal counsel to him regarding Digital Realty in any regard whatsoever. In addition, Mr. Somers did not share any confidential information with me about his job at Digital Realty. My representation of Mr. Somers was limited to advising him on issues relating to the negotiation of an employment agreement with Newcastle.

Id. at ¶ 14. Somers confirms that he "did not ask Mr. Jacobs to negotiate [his] agreement with Digital [Realty]." Somers Decl. at ¶ 2. However, Somers claims that he used "ideas" from Mr. Jacobs' presentation outline "in other subsequent matters," and that he "obtained my job with Digital Realty Trust, Inc. while still in communication with Mr. Jacobs." *Id.* at ¶¶ 2-3. Mr. Somers also claims that he "discussed the Digital Realty opportunity briefly with Mr. Jacobs and informed Mr. Jacobs about some aspects of my approach to obtaining the job with Digital." *Id.* at ¶ 4.

III. DISCUSSION

A. *Defendant's Motion to Dismiss Somers' Dodd-Frank Whistleblower Claim*

Digital Realty moves to dismiss Somers' second cause of action, which alleges that Somers was wrongfully terminated from his employment in retaliation for reporting his supervisor's purported law violations to Digital Realty management. According to Digital Realty, Somers does not qualify as a "whistleblower" under the Dodd-Frank Act because he did not report any alleged law violations to the SEC. Digital Realty also argues in its reply brief that

Somers has not adequately pleaded that his internal reports were either "required or protected" under the Sarbanes-Oxley Act. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii). For the reasons explained below, Digital Realty's first argument is unavailing and its second argument was waived where Digital Realty failed to raise it in its original motion.

1. *Passage of Dodd-Frank and Relevant Statutory Provisions*

Dodd-Frank established a new whistleblower program in 2010 by adding Section 21F to the Securities Exchange Act of 1934 (Exchange Act). *See* Section 21F, codified at 15 U.S.C. § 78u-6. Section 21F "encourages individuals to provide information relating to a violation of U.S. securities laws" through two "related provisions that: (1) require the SEC to pay significant monetary awards to individuals who provide information to the SEC which leads to a successful enforcement action; and (2) create a private cause of action for certain individuals against employers who retaliate against them for taking specified protected actions." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623 (5th Cir. 2013). Courts frequently refer to the award provision as the "whistleblower-incentive program" and the provision protecting whistleblowers from retaliation as the "whistleblower-protection program." *See id.* at 623 n. 3; *see also Connolly v. Remkes*, No. 5:14-cv-01344-LHK, 2014 WL 5473144, at *4 (N.D. Cal. Oct. 28, 2014). Only the provisions of the whistleblower-protection program are at issue here.

The DFA defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who

provide, information relating to a violation of the securities laws ***to the Commission***, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6) (emphasis added). Dodd-Frank forbids employers from retaliating against whistleblowers, and sets forth specific prohibitions. Specifically the DFA provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter [*i.e.*, the Exchange Act], including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii). The DFA provides that an employee may bring suit against any employer who violates the whistleblower protections codified in Section 21F. *See* 15 U.S.C. § 78u-6(h)(1)(B). Dodd-Frank further provides that "[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section

[*i.e.*, the whistleblower program] consistent with the purposes of this section." 15 U.S.C. § 78u-6(j).

An aggrieved whistleblower under the DFA may also have a claim under the Sarbanes-Oxley Act, which created a civil right of action to protect employees from retaliation for reporting law violations. *See* 18 U.S.C. § 1514A. However, the remedies and procedures associated with a Sarbanes-Oxley Act anti-retaliation claim are considerably different from those provided under the whistleblower-protection provision of the DFA. Three main differences bear highlighting. First, the DFA provides for recovery of two times back pay, whereas Sarbanes-Oxley provides for recovery of back pay without a multiplier, along with other economic damages such as emotional distress damages. *Compare* 15 U.S.C. § 78u-6(h)(1)(C) *with* 18 U.S.C. § 1514A(c)(2); *see also Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (per curiam) (holding that Sarbanes-Oxley "affords noneconomic compensatory damages, including emotional distress and reputational harm"). Second, Sarbanes-Oxley act claimants must first file an administrative complaint with the Department of Labor, whereas DFA plaintiffs are not required to exhaust any administrative remedies. *See* 18 U.S.C. § 1514A(b)(1). And third, DFA claimants have between six and ten years to file suit from the time a violation occurs, whereas Sarbanes-Oxley plaintiffs must file suit between 180 days after the violation occurs and 180 days after the employee becomes aware of the violation. *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii); 18 U.S.C. § 1514A(b)(2)(D).

2. *The SEC Issues Rule 21F-2(b)(1) Interpreting the Whistleblower-Protection Provisions*

The SEC issued final rules interpreting and implementing Section 21F of the DFA in June 2011. *See* Securities Whistleblower Incentives and Protections (Adopting Release), 78 Fed. Reg. 34300, 34301-34304 (June 13, 2011). In particular, the SEC issued Exchange Act Rule 21F-2(b)(1), which states that for the purpose of the whistleblower-protection program, "you are a whistleblower if . . .[y]ou provide information in a manner described in . . .15 U.S.C. 78u-6(h)(1)(A)." *See* 17 C.F.R. § 240.21F-2(b)(1).

As noted above, the DFA—and specifically, section 78u-6(h)(1)(A)—"sets forth three types of protected whistleblower activity, the last of which [*i.e.*, subsection (iii)] includes 'making disclosures that are required or protected under the Sarbanes-Oxley Act.'" *Connolly*, 2014 WL 5473144, at *4 (quoting 15 U.S.C. § 78u-6(h)(1)(A)(iii)). "In turn, the Sarbanes-Oxley Act affords whistleblower protection to an employee who gives 'information or assistance' to 'a person with supervisory authority over the employee'" *id.* (quoting 18 U.S.C. § 1514A(a)(1)(C)), or to any other "such person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A(a)(1)(C). That is, Sarbanes-Oxley protects employee disclosures made internally to certain supervisory personnel irrespective of whether the employee separately reports the information to the SEC. Thus, by providing that an individual is a "whistleblower if" they "provide information in a manner described in" subsection (iii) of section 78u-6(h)(1)(A), Rule 21F-2(b)(1) stipulates that the whistleblowing-protection program of the DFA does ***not*** require an employee

to report violations directly to the SEC. *See Connolly*, 2014 WL 5473144, at *4; *Asadi*, 720 F.3d at 629 (refusing to defer to SEC interpretation of the DFA, but explaining that Rule21F-2(b)(1) defines whistleblower "broadly by providing that an individual qualifies as a whistleblower even though he never reports any information to the SEC, so long as he has undertaken the protected activity listed in 15 U.S.C. § 78u-6(h)(1)(A)"); *see also* Adopting Release at 34304 (explaining that under the SEC rule, "the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission").

3. *SEC Rule 21F-2(b)(1) is Entitled to Deference*

The determinative issue for resolving Digital Realty's motion to dismiss is whether SEC Rule 21F-2(b)(1) is entitled to *Chevron* deference. *See Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that a court should defer to a responsible executive agency's permissible construction of a statute where the statutory language is ambiguous or otherwise does not speak precisely to the question at issue). If it is entitled to deference, then Somers has pleaded a legally sufficient retaliation claim under Dodd-Frank. For instance, Somers alleges that he was fired in retaliation for "complain[ing] to Defendant Digital's officers, directors, and/or managing agents that certain of Kumar's activities violated requirements for internal controls established by the Sarbanes-Oxley Act of 2002." Complaint at ¶ 46. If, on the other hand, the Commission rule is not entitled to deference, then a fair reading of the DFA requires that Somers must have reported a violation to the SEC in order to have cause of action under the DFA: Since Somers admits that

he did not make a report to the SEC before he was fired, he could not be a whistleblower under the DFA.

a. *Applicability and Legal Standards of Chevron Framework*

"[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see also Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1272 (9th Cir. 2015) (holding that *Chevron's* reasonableness standard applies to a "regulation duly promulgated after a notice-and-comment period"). Rule 21F-2(b)(1) was promulgated pursuant to an express provision of the DFA and after a notice-and comment period, and thus qualifies for *Chevron* deference. *See* 15 U.S.C. § 78u-6(j); *see also* Adopting Release at 34300.

However, consideration of whether an agency interpretation is permissible under *Chevron* requires an examination of two steps. First, as a threshold matter, the Court must consider "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If so, then the inquiry is over, and we must give effect to the 'unambiguously express intent of Congress.'" *Navarro*, 780 F.3d at 1271 (quoting *Chevron*, 467 U.S. at 842). But if the statute is silent or ambiguous with respect to the specific issue, the Court must proceed to the second step and determine whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If the agency's interpretation of

the statute "is a reasonable one, this court may not substitute its own construction of the statutory provision," even if the Court believes the provision would best be read differently. *Navarro*, 780 F.3d at 1273 (citation omitted).

b. *Chevron Step One: The Statute is Ambiguous*

Under the first step of *Chevron*, the Court must determine whether the whistleblower-protection provisions of the DFA are ambiguous. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). General cannons of statutory interpretation are particularly helpful in resolving close cases regarding statutory meaning. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 611 (1989). Here, two interpretative cannons are particularly germane to this Court's inquiry, the surplusage cannon, which holds that a "court should give effect, if possible, to every word and every provision Congress used" in the statute, *Asadi*, 720 F.3d at 622, and the harmonious-reading cannon, which provides that a court should "interpret [a] statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see generally* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174-183 (1st ed. 2012) (discussing the surplusage and harmonious-reading cannons).

As Judge Koh recently explained, the "large majority"[3] of courts to consider Dodd-Frank's whistleblower-protection provisions have found ambiguity "in the interplay between §§ 78u-6(a)(6) and 78u-6(h)(1)(A)(iii)" and thus have "deferr[ed] to the SEC's interpretation of Dodd-Frank."[4] *Connolly*, 2014 WL 5473144, at *5. To appreciate the tension between these provisions, it is helpful to first examine the overall structure of Section 21F. As quoted in full above, Section 21F(h)(1)(A) prohibits an employer from retaliating against a whistleblower for: (i) "providing information to the Commission in accordance

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[3] The following is a non-exhaustive list of other district courts that have concluded that the DFA is ambiguous and determined that the SEC interpretation of the DFA whistleblower-protection provisions is entitled to deference. *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149 (SDW)(MCA), 2014 WL 940703, at *3-6 (D.N.J. Mar. 11, 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 44 (D. Mass. 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *see also Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, at *4-6 (S.D.N.Y. May 4, 2011) (finding Section 21F of the DFA ambiguous and concluding, without reference to the then-uncodified SEC rule discussed here, that "whistleblower" under the DFA encompasses those who make required internal reports under Sarbanes-Oxley).

[4] As will be discussed below, however, a small minority of courts—including the only appellate court to have ruled on the issue—have held that the language of the DFA is unambiguous and requires a whistleblower to make a report to the SEC in order to qualify for anti-retaliation protection. *See, e.g., Asadi*, 720 F.3d at 629; *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756-57 (N.D. Cal. 2013); *Verfuerth v. Orion Energy Sys., Inc.*, ___ F. Supp. 3d ___, 2014 WL 5682514, at *3 (E.D. Wisc. 2014). The Court respectfully declines to follow these courts' reasoning.

with this section"; (ii) "initiating, testifying in, or assisting in" an investigation or enforcement action of the Commission "based upon or related to such information"; or (iii) "in making disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act (including section 78j-1 of the Exchange Act), 18 U.S.C. § 1513(e), or "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h)(1)(A)(i)-(iii). As the statutory language makes plain, subsections (i) and (ii) protect individuals from retaliation for whistleblowing to the Commission about securities law violations. Subsection (iii), however, appears to afford much broader protection, prohibiting retaliatory acts against employees who make much more varied types of disclosures, such as disclosures of securities law violations to an immediate supervisor at their company or to the board of directors. *See* 18 U.S.C. § 1514A(a)(1)(C) (protecting certain disclosures regarding securities laws violations made to individuals with "supervisory authority" over the reporting employee); 15 U.S.C. § 78j-1 (requiring certain disclosures regarding illegal acts to be made to the board of directors).

The tension arises when one considers the definition of a "whistleblower" as codified in Section 21F(a)(6). The DFA only provides anti-retaliation protection to "a whistleblower in the terms and conditions of employment," and Section 21F(a)(6) defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws ***to the Commission***." 15 U.S.C. § 78u-6(a)(6) (emphasis added). As a number of courts have recognized, Section21F(h)(1)(A)(iii) appears to be "'in direct conflict with the DFA's definition of a whistleblower because [subsection (iii)] provides protection to persons who have not disclosed information to the

SEC,'" while Section21F(a)(6) requires the person report to the Commission. *Khazin*, 2014 WL 940703, at *6 (quoting *Genberg*, 935 F. Supp. 2d at 1106); *see also Connolly*, 2014 WL 5473144, at *6 (finding statutory ambiguity given the conflict between the DFA provisions). Put differently, the majority of courts to consider the issue have found that subsection (iii) "would be ineffective if whistleblowers must report directly to the SEC." *Connolly*, 2014 WL 5473144, at *6.

Digital Realty's arguments that there is no ambiguity or conflict in the DFA—which essentially parrot the arguments made by those courts that have concluded similarly—are not entirely persuasive. The first argument is that because the "whistleblower" definition in Section 21F(a)(6) is plain and unambiguous, the plain language of that definition must control over any putatively conflicting statutory text that appears later in Section 21F. *See Asadi*, 720 F.3d at 623-24 (holding that there can "only be one category of whistleblower" under the DFA given the "plain language and structure" of the Act); *see also Banko*, 20 F. Supp. 3d at 756 (holding that "the statute specifies that an employer may not [retaliate] against a *whistleblower*. It is not until after this clause that Congress adds protection for reports that are protected by Sarbanes-Oxley, indicating that the latter is subordinate to the former") (emphasis in original).

In support of the argument that a clear definitional term must control, the *Asadi* court cites to the Scalia & Garner treatise, which states that "[w]hen . . . a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning." Scalia & Garner, *supra*, at 226 (emphasis in original). But just two pages later, the very same treatise recognizes that while

a statutory definition provides a "very strong indication" of a term's meaning, it is "nonetheless one that can be contradicted by other indications. So where the artificial or limited meaning would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two, the normal meaning should be applied." *Id.* at 228. Indeed, just two terms ago the Supreme Court concluded that an express and clear definitional term in a statute may ultimately need to yield to countervailing interpretative factors in order to harmonize the meaning of a statute. *See Bond v. United States*, 134 S. Ct. 2077, 2091 (2014). In *Bond*, the Court considered whether a criminal prohibition codified in the Chemical Weapons Convention Implementation Act of 1998 could apply to a defendant whose "amateur attempt . . . to injure her husband's lover" with common chemicals resulted in the victim suffering a "minor thumb burn readily treated by rinsing with water." *Id.* at 2083. The defendant had been convicted under statutory language that rendered it unlawful for any person to knowingly "use . . . any chemical weapon."[5] *Id.* at 2086; *see also* 18 U.S.C. § 229(a). Despite the statute's clear definition of "chemical weapon," and despite the fact that the defendant had obviously used a "chemical weapon" with the necessary *mens rea*, the Court reversed the defendant's conviction. *Bond*,

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[5] "Chemical weapon" was defined in relevant part as "[t]oxic chemicals and their precursors . . ." where "toxic chemical" was in turn defined as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Bond*, 134 S. Ct. at 2085. As the Court noted, the ordinary reading of the relevant statutory language would "render the statute striking in its breadth and turn every kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Id.* at 2086 (internal quotation marks and citation omitted).

134 S. Ct. at 2091. Specifically, the majority held that "chemical weapon" could not be given its defined meaning because doing so would violate other principles of statutory interpretation—namely the "background assumption that Congress normally preserves the constitutional balance between the National Government and the States." *Id.* at 2091. (citation omitted); *see also id.* at 2097 (Scalia, J. dissenting) (recognizing that a court may ignore the unambiguous words of a statutory definition in the rare case where doing so will interpret the "words fairly, in light of their statutory context").

Indeed, just this Term the Court again found contextual ambiguity in what otherwise appeared to be seemingly clear statutory language. *See Yates v. United States*, 135 S. Ct. 1074 (2015). In *Yates*, the defendant had been convicted of violating a provision of Sarbanes-Oxley that prohibited the destruction of a "tangible object" with the intent to obstruct a law enforcement investigation. *Id.* at 1079. The Court noted that "although dictionary definitions" of terms such as "tangible object" should "bear consideration, they are not dispositive. . . ." *Id.* at 1082. The Court ultimately reversed Yates' conviction—obtained after he destroyed what was indisputably a "tangible object" (fish) with the requisite intent—because the majority concluded that the term "tangible object" in the relevant provision of Sarbanes-Oxley could not be given its dictionary definition in light of the "specific context in which that language is used," including the historic origins and legislative purpose of the law. *Id.* at 1082; *see also United States v. Carroll*, No. CR-13-566 EMC, 2015 WL 2251206 (N.D. Cal. May 13, 2015) (discussing *Yates*).

As both *Bond* and *Yates* demonstrate, a court may decline to strictly apply a definitional term in a statute, or

otherwise adopt the plain and ordinary meaning of statutory language, where other tools of statutory interpretation strongly suggest such a result. According, just because Section 21F expressly defines the term "whistleblower" to require a report to the SEC does not mean that the plain language of that definition *must* control in the face of arguably conflicting statutory language or other persuasive indications of legislative intent. *See generally Bond*, 134 S. Ct. at 2091.

In determining whether the DFA's definition of "whistleblower" itself compels the outcome in this case, the Court must consider the "specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Digital Realty argues that there is no conflict between the provisions of the DFA which would render the statute ambiguous, and thus there is no reason to defer to the SEC's interpretation of the statute. For the reasons explained below, the Court disagrees.

i. *The Whistleblower Definition Would Render Subsection (iii) Superfluous Because That Definition Conflicts with Various Provisions of Subsection (iii) Which Clearly Contemplate Only Internal Reports, and not Reports to the SEC*

As noted above, the broad language of subsection (iii) is arguably in tension with the narrower definition of a whistleblower contained in Section 21F(a)(6). As Judge Koh observed in *Connolly*, subsection (iii) would be rendered meaningless by the strict application of the definition of "whistleblower" under the DFA because subsection (iii) appears to contemplate a broad scope of protec-

tion for individuals who do *not* make reports to the Commission. *Connolly*, 2014 WL 5473144, at *6. A number of courts are in accord. *See* footnote 3, *supra*.

Despite the fact that a number of courts have found that subsection (iii) of the DFA "would be ineffective if whistleblowers must report directly to the SEC," *Connolly*, 2014 WL 5473144, at *6, the Fifth Circuit has held that the restrictive definition of "whistleblower" articulated in Section 21F(a)(6) does not render Section 21F(h)(1)(a)(iii) superfluous. *Asadi*, 720 F.3d at 626. In support of this argument, the Fifth Circuit posited a hypothetical situation whereby the whistleblower protections of Section 21F(h)(1)(a)(iii) could have effect if an employee both internally reported securities law violations to his employer and to the SEC:

> Assume a mid-level manager discovers a securities law violation. On the day he makes this discovery, he immediately reports this securities law violation (1) to his company's chief executive officer ("CEO") and (2) to the SEC. Unfortunately for the mid-level manager, the CEO, who is not yet aware of the disclosure to the SEC, immediately fires the mid-level manager. The mid-level manager, clearly a "whistleblower" as defined in Dodd-Frank because he provided information to the SEC relating to a securities law violation, would be unable to prove that he was retaliated against because of the report to the SEC. Accordingly, the first and second category of protected activity would not shield this whistleblower from retaliation. The third category of protected activity, however, protects the mid-level manager. In this scenario, the internal disclosure to the CEO, a person with supervisory

> authority over the mid-level manager, is protected under 18 U.S.C. § 1514A, the anti-retaliation provision enacted as part of the Sarbanes-Oxley Act of 2002 ("the SOX anti-retaliation provision"). Accordingly, even though the CEO was not aware of the report to the SEC at the time he terminated the mid-level manager, the mid-level manager can state a claim under the Dodd-Frank whistleblower-protection provision because he was a "whistleblower" and suffered retaliation based on his disclosure to the CEO, which was protected under SOX.

Id. at 627-28.

Digital Realty's reliance on *Asadi* is misplaced. While the Court assumes, without deciding, that the above hypothetical posited in *Asadi* actually presents one situation where sections 21F(a)(6) and 21F(h)(1)(A)(iii) could be applied in harmony such that the latter section would not be superfluous,[6] the Court finds there are other points of tension between these two provisions.

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[6] The Court notes that the SEC has taken the position in various other litigations that the Fifth Circuit hypothetical is flawed because "[w]hether an individual's disclosures constitute a 'protected activity' under the Fifth Circuit's narrow reading of clause (iii) would turn on whether the individual has made a separate disclosure to the Commission. The Commission contends that if the employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in a protected activity." *See* Br. of the Sec. & Exch. Comm'n at 23, *Safarian v. American DG Energy Inc.*, No. 14-2734, 2014 WL 7240193 (3d Cir. Dec. 11, 2014) (SEC Amicus Br.). However, under the Fifth Circuit's hypothetical, the defendant

There are a number of provisions in subsection (iii) that conflict with the assumption that only those who report to the SEC enjoin the whistleblowing protection of the DFA. For instance, subsection (iii) expressly protects a whistleblower who makes required or protected disclosures under section 78j-1 of the Exchange Act. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii). Section 78j-1(b), entitled "Required response to audit discoveries," provides that an individual conducting an audit of a public company must, under certain circumstances, "inform the appropriate level of the management of the issuer . . . [of] illegal acts that have been detected or have otherwise come to the attention" of the auditor "unless the illegal act is clearly inconsequential." 15 U.S.C. § 78j-1(b)(1)(B). Section 78j-1 further requires that if the company (*i.e.* "issuer") does not take reasonable "remedial action" after receiving such a report of illegal acts, an auditor must "directly report its conclusions to the board of directors" of the corporation. 15 U.S.C. § 78j-1(b)(2). Critically, section 78j-1 only *permits* an auditor to report such "illegal acts" to the SEC *if* the board of directors or other internal management fails to take appropriate remedial action. *See* 15 U.S.C § 78j-1(b)(3)(B) (providing that an auditor may either resign or report putative law violations to the SEC where management fails to appropriately respond to an internal report of such violations). That is, section 78j-1 clearly requires internal reporting of illegal acts, and does not contemplate any report of such acts to the SEC, except in limited circumstances. Congress's express mention of section 78j-1

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would have the intent to retaliate because of the employee's complaint to management; the concurrent complaint to the SEC is not the purported basis of the retaliatory intent but serves the satisfy the gatekeeping function of Section 21(a)(6)'s definition of "whistleblower" entitled to DFA's remedies.

in subsection (iii) of the Dodd-Frank whistleblower protection provision would seem to indicate that Congress wished to cover auditors who made required internal reports about illegal acts. Yet if this Court is required to limit the DFA's protection to those who report to the SEC, nearly all of the conduct "required" under section 78j-1 and its scheme of internal reports would be undermined.

As another example, subsection (iii) clearly covers internal reports required of attorneys under Sarbanes Oxley. *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (prohibiting retaliation for disclosures that are "required or protected under the Sarbanes-Oxley Act"). 15 U.S.C. § 7245 requires attorneys to "report evidence of a material violation of securities law ... or similar violation[s] by the company ... to the chief legal counsel or the chief executive officer of the company." 15 U.S.C. § 7245(1). Congress has further required attorneys to report such evidence "to the audit committee of the board of directors ... or to another committee of the board of directors" if "the counsel or officer does not appropriately respond to the evidence." 15 U.S.C. § 7245(2). Similar to Section 78j-1, Sarbanes-Oxley requires attorneys to report certain law violations internally up the chain of command. Indeed, a later-enacted SEC rule provides that attorneys must first report violations internally *before* any eventual report can be made to the SEC, because "[b]y communicating [evidence of a material violation] to the issuer's officers or directors, an attorney does not reveal client confidences or secrets privileged or otherwise protected ... related to the attorney's representation of an issuer." 17 C.F.R. § 205.3(b)(1). The SEC rule specifically contemplates that attorneys will *not* externally report law violations to the Commission unless a number of preconditions are satisfied. *See* 17 C.F.R.

§ 205.3(d)(2)(i)-(ii). Indeed, external reports may be prohibited by attorney ethics rules.[7] Applying the narrow definition of "whistleblower" from Section 21F(a)(6) to attorneys who have made required internal reports under Sarbanes-Oxley would leave such lawyers largely (if not entirely) unprotected from retaliation under the DFA.

In light of these examples, Section 21F(a)(6)'s narrow definition of whistleblower cannot easily be reconciled with Section 21F(h)(1)(A)(iii)'s seemingly expansive scope, which appears to cover conduct under statutes that expressly *require* internal whistleblowing activity to occur before an individual may even consider making a voluntary report to the SEC.

ii. *The Whistleblower Definition Would Render the Words "To The Commission" in Subsections (i) and (ii) Superfluous*

Digital Realty (and *Asadi*'s) next argument—that reading the DFA to apply to employees who do not make a report to the SEC would read the words "to the Commission" out of the statutory definition of a whistleblower—is not dispositive. *See Asadi*, 720 F.3d at 625; *Banko*, 20 F. Supp. 3d at 756. While it is true that the SEC's Rule does effectively read the words "to the Commission" out of the definition of whistleblower as Section

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[7] The Court notes that there has been some controversy between the SEC and certain State Bar Associations, which have argued that an attorney may not report to the SEC without client consent, and that attorneys may be subject to discipline for complying with 17 C.F.R. § 205.3. *See generally The New World of Risk for Corporate Attorneys and Their Boards Post-Sarbanes-Oxley: An Assessment of Impact and a Prescription for Action*, 2 Berkeley Bus. L.J. 185, 205-2010 (2005).

21F(a)(6) would apply to (iii), Digital Realty's interpretation itself would create surplusage in subsections (i) and (ii). Section 21F(h)(1)(A) prohibits retaliation against a "whistleblower," which is defined in Section 21F(a)(6) as an "individual who provides . . . information relating to a violation of the securities laws to the Commission." 15 U.S.C. § 78u-6(a)(6). But applying this limited definition of whistleblower would render superfluous the phrase "to the Commission" in subsections (i) and (ii). For instance, subsection (i) prohibits retaliating against a whistleblower "in providing information to the Commission in accordance with this section." 15 U.S.C. § 78u-6(h)(1)(A)(i). This subsection would be entirely unnecessary if, as Digital Realty and the *Asadi* court contend, only persons who provide information to the Commission can ever be whistleblowers. As the Supreme Court has noted, "the cannon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'Ship*, 131 S. Ct. 2238, 2248 (2011) (internal quotation marks and citation omitted). Here, no interpretation appears to avoid excess language.

iii. *The Wording of Sections (i) and (ii) as Compared to (iii) and the Legislative History of the DFA Further Supports a Finding of Ambiguity*

Moreover, subsections (i) and (ii) expressly refer to providing information or testimony to the Commission, while (iii) makes no similar reference to the Commission. The difference in language, wherein the key qualification articulated in (i) and (ii) is omitted from (iii), suggests a legislative intent that (iii) not be read to require SEC reporting. *See Sebelius v. Auburn Regional Med. Cntr.*, 133 S. Ct. 817, 825 (2013) ("We have recognized, as a general

rule, that Congress's use of 'certain language in one party of the statute and different language in another' can indicate that 'different meanings were intended.'") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)).

Indeed, this construction accords with the legislative history. Subsection (iii) was added to the DFA at the very last minute. Indeed, subsection (iii) never appears in any version of DFA until it formally passed, nor does it appear to have ever been discussed in the legislative record. *See, e.g.*, H.R. 4173, 111th Congress (May 27, 2010; Public Print) (last version of Dodd-Frank before passage did not contain relevant subsection). The conflict between the newly-added (and very broad) subsection (iii) and the narrow whistleblower definition that was consistently present in every version of the bill from its first introduction in Congress, *see* H.R. 4173, 111th Congress (Dec. 2, 2009), could well have been a legislative oversight. And given the belated addition of subsection (iii), it is at least reasonable to assume that Congress intended for the scope of the DFA whistleblower-provisions to be broader than in earlier versions of the bill, which versions unambiguously required an external report to the Commission in order to be protected from employer retaliation. *See, e.g.*, H.R. 4173, 111th Congress (May 27, 2010; Public Print) (report to Commission unambiguously required under penultimate draft of Dodd-Frank). Certainly, the legislative history contains no indication, apart from the definition of whistleblower itself, that Congress purposefully intended to limit whistleblower protections under (iii) solely to those making reports to the Commission. *See Bond*, 134 S. Ct. at 2091 (even express statutory definitions may be overridden in appropriate circumstances).

iv. *The Fifth Circuit's Concerns Regarding Rendering the Sarbanes-Oxley Act Anti-Retaliation Provisions "Moot" are Unfounded*

The *Asadi* court also contends that an expansive reading of the Dodd-Frank whistleblower protection provisions would render the Sarbanes-Oxley "anti-retaliation provision, for practical purposes, moot." *Asadi*, 720 F.3d at 628. According to the Fifth Circuit, an expansive construction "has this impact because an individual who makes a disclosure that is protected by the SOX anti-retaliation provision could also bring a Dodd-Frank whistleblower protection claim on the basis that the disclosure was protected by SOX." *Id.* But such an individual would be unlikely to file suit under Sarbanes-Oxley *Asadi* tells us, because Dodd-Frank "provides for greater monetary damages," has a longer limitations period, and does not require administrative exhaustion with the Department of Labor before filing suit in federal court. *Id.* at 629. This Court disagrees.

The Fifth Circuit overlooked two reasons why individuals might choose to file a claim under Sarbanes-Oxley's whistleblower provisions, either in addition to, or in place of, a DFA claim. First, certain individuals may actually prefer the administrative forum provided by SOX, especially given that OSHA assumes responsibility for investigating and presenting a retaliation claim under Sarbanes-Oxley. *See, e.g.*, 29 C.F.R. § 1980.104-1980.105 (providing that OSHA, rather than the plaintiff, will investigate Sarbanes-Oxley whistleblower claims in the first instance and present its findings to an administrative law judge). Second, while the DFA provides greater back pay than is allowable under SOX, a plaintiff who prevails under SOX can obtain other types of monetary damages not

available under the DFA. For instance, a winning SOX plaintiff can recover damages for noneconomic harms such as emotional distress and reputational harm. *See* 18 U.S.C. § 1514A(c)(2)(C); *Halliburton*, 771 F.3d at 266 (holding that "the statute affords noneconomic compensatory damages, including emotional distress and reputational harm"). Put simply, there is no reason to suspect that a broad reading of the DFA will put an end to Sarbanes-Oxley whistleblower actions, even if such a consideration were relevant at *Chevron* step-one.

v. *Policy Reasons Support a Finding of Ambiguity*

Because this Court believes that the language of the DFA whistleblower-protection provision is at least somewhat in conflict, it is relevant to observe that the Fifth Circuit's resolution of that conflict—reading subsection (iii) narrowly to require a report to the Commission—seems at odds with public policy underlying the DFA. As Judge Koh has noted, the Fifth Circuit's reading of the law is entirely "contrary to Dodd-Frank's purpose of encouraging reporting of securities violations" and otherwise improving accountability in the financial system. *Connolly*, 2014 WL 5473144, at *5; *see also* Pub. L. 11-203, H.R. 4173 (stating that a main purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system"). Moreover, reading subsection (iii) to require a report to the SEC would render the statute "utterly ineffective as a preventive measure because employers would not know that a report was made to the Commission." *Id.* at *6. As the SEC has explained in an amicus brief, "because in [the Fifth Circuit's posited scenario] employers would not know that a report was made to the Commis-

sion, clause (iii) would have no appreciable effect in deterring employers from taking adverse employment action for internal reports or the other disclosures listed in clause (iii)." SEC Amicus Br. at 22. Put simply, requiring SEC reporting adds nothing to the policy of deterring employer retaliation.

vi. *Summary*

At bottom, it is difficult to find a clear and simple way to read the statutory provisions of Section 21F in perfect harmony with one another. While *Asadi*'s interpretation of the statute is not unreasonable, neither is the countervailing interpretation rendered by a number of district courts. The issue before this Court is not the preferable interpretation, but whether the statute is ambiguous. The Court finds there is sufficient ambiguity to open the door to administrative interpretation and invocation of *Chevron* deference to the SEC's interpretative regulation. *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-66 (2007) (affording *Chevron* deference to agency interpretation because where two statutory provisions present "seemingly categorical—and, at first glance, irreconcilable—legislative commands" there is a "fundamental ambiguity that is not resolved by the statutory text"). The relevant "portions of Dodd-Frank are—at a minimum—susceptible to more than one interpretation when read together." *Connolly*, 2014 WL 5473144, at *6; *see also Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 147-48 (S.D.N.Y. 2013) ("When considering the DFA as a whole, it is plain that a narrow reading of the statute requiring a report to the SEC conflicts with the anti-retaliation provision, which does not have such a requirement. Thus, the governing statute is ambiguous."). For all of the reasons explained above, the

Court concludes that the DFA provisions are ambiguous, and thus will proceed on to consider *Chevron* step-two.

4. *Chevron Step-Two: The SEC Rule is Entitled To Deference*

Given that the whistleblower protection provisions of the DFA are ambiguous, the next question this Court must decide is whether SEC Rule 21F-2(b)(1) is a "permissible construction of the statute." *Connolly*, 2014 WL 5473144, at *6 (quoting *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013)). As every court that has considered *Chevron* step-two has concluded, the answer to that question is "yes." *See id.* ("The SEC's interpretation is a reasonable position that most other courts have adopted"); *see also Khazin*, 2014 WL 940703, at *6 (holding that "the SEC's rule is a permissible construction of the statute and warrants judicial deference"); *Murray*, 2013 WL 2190084, at *5 (holding that "the SEC's interpretation is a reasonable one").

First, the SEC's interpretation is reasonable because it effectively eliminates the tension between the narrow definition of whistleblower in Section 21F(a)(6) and the seemingly very broad coverage of subsection (iii). Put simply, the SEC's interpretation is reasonable because it permits a large class of individuals to qualify as protected whistleblowers, a result which appears consistent with the broad language Congress employed in subsection (iii).

Second, the SEC's interpretation is reasonable because it "comports with Dodd-Frank's scheme to incentivize broader reporting of illegal activities." *Connolly*, 2014 WL 5473144, at *6; *see also Kramer v. Trans-Lux Corp.*, No. 3:11-cv-1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sep. 25, 2012) (explaining that the DFA "appears to have

been intended to expand upon the protections of Sarbanes-Oxley"); Pub. L. 11-203, H.R. 4173 (stating that a main purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system").

Third, the Court finds the SEC's interpretation is reasonable because it encourages internal reporting of possible law violations. As the SEC persuasively explained in an amicus brief, Rule 21F-2(b)(1) establishes parity between individuals who first report to the SEC and those who first report internally, thereby avoiding a "two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting internally in appropriate circumstances, and, thus, jeopardize the benefits that can result from internal reporting." SEC Amicus Br. at 28; *see also* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70488, 70488 (Nov. 17, 2010) (expressing concern that overly incentivizing external reporting would "reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws"); *id.* at 70516 (expressing concern that the Commission will "incur costs to process and validate" whistleblower "tips of varying quality" if companies are not allowed "to investigate and respond to potential securities laws violations prior to reporting them to the Commission"); Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 Fordham L. Rev. 1245, 1250 (2009) (arguing that "internal protections are particularly crucial in view of research findings that . . . employees are more likely to choose internal reporting systems").

Finally, the Court finds the SEC's interpretation is reasonable because it enhances the Commission's ability to bring enforcement actions against employers that engage in retaliatory conduct. As the SEC has stated, a narrow reading of Dodd-Frank would "significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action." SEC Amicus Br. at 29; *see also Connolly*, 2014 WL 5473144, at *6.

Put simply, Rule 21F-2(b)(1) appears to be a reasonable interpretation of Dodd-Frank's whistleblower-protection provisions, and thus is entitled to deference.

5. *Digital Realty's Remaining Argument is Waived*

In its reply brief, Digital Realty argues for the first time that Somers' retaliation claim must fail because he did not adequately allege that his internal reports were "protected" under Sarbanes-Oxley and thus he cannot claim under subsection (iii). Specifically, Digital Realty argues that because Somers did not exhaust his administrative remedies to bring a whistleblower claim under Sarbanes-Oxley directly, his disclosures were not "protected" under Sarbanes-Oxley, and thus the DFA does not apply irrespective of whether Somers could have qualified as a "whistleblower." *See* 15 U.S.C. § 78u-6(h)(1)(A)(iii) (DFA prohibits retaliation against an individual who makes "disclosures that are required or protected under the Sarbanes-Oxley Act").

Because Digital Realty did not make this argument in its initial motion to dismiss, the argument is waived. *See Dytch v. Yoon*, No. C 10-02915 MEJ, 2011 WL 839421, at *3 (N.D. Cal. Mar. 7, 2011) (explaining that parties "cannot raise a new issue for the first time in their reply

briefs"); *see also United States v. Anderson*, 472 F.3d 662, 668 (9th Cir. 2006) (recognizing the general principle that arguments raised for the first time in a reply brief are waived). Digital Realty's motion to dismiss Somer's DFA claim is denied.

B. *Plaintiff's Motion to Disqualify Defendants' Counsel*

Plaintiff's motion to disqualify Defendants' counsel, Seyfarth Shaw, must similarly be denied. "[W]e apply state law in determining matters of disqualification." *In re Cnty. of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). Rule 3-310 of the California Rules of Professional Conduct provides that a member of the bar "shall not, without the informed written consent of each client . . . [a]ccept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict." Cal. Rules of Prof. Conduct 3-310(C)(2). Where the potential conflict arises from the successive representation of clients with potentially adverse interests, as it does here, "the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." *Flatt v. Super. Ct.*, 9 Cal.4th 275, 283 (1994) (emphasis omitted). "Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations." *Id.* (emphasis in original).

Under the substantial relationship test, disqualification "turns on two variables: (1) the relationship between the legal problem involved in the former representation

and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698, 709 (2003). "[D]isqualification will depend upon the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation." *Id.* At bottom, "successive representations will be 'substantially related' when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." *Id.* at 713.

Here, the substantial relationship test is plainly not met. Somers hired Eugene Jacobs, a partner at Seyfarth Shaw, to provide 2.1 hours of legal work related to his efforts to secure a position at Newcastle Limited, a Chicago-based real estate advisor and investor. *See* Eugene Jacobs Decl. at ¶ 8. Somers admits that Jacobs did not advise him with regards to his employment contract with Digital Realty. Somers Decl. at ¶ 2. Somers vaguely claims that he "discussed the Digital Realty opportunity briefly with Mr. Jacobs and informed Mr. Jacobs about some aspects of my approach to obtaining the job with Digital," but even if this were true,[8] it would not demonstrate that "infor-

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[8] Jacobs denies Somers' vague allegations: "Mr. Somers never sought any legal advice of any nature from me in connection with the job at Digital Realty, nor did I provide any legal counsel to him regarding Digital Realty in any regard whatsoever. In addition, Mr.

mation material to . . . accomplishment of the former representation . . . is also material to the . . . accomplishment of the current representation." *Jessen*, 111 Cal. App. 4th at 713. At best, Jacobs provided Somers with advice regarding how to best negotiate an executive agreement, advice that Somers later used when negotiating with Digital Realty. The information that would have passed from Somers to Jacobs in order to "evaluate" or "accomplish" this prior representation has absolutely nothing to do with the "evaluation, prosecution, settlement or accomplishment of the current representation," where Seyfarth Shaw is defending Digital Realty against claims of discrimination, whistleblower retaliation and defamation. Plaintiff's disqualification motion is therefore denied.

IV. CONCLUSION

Defendants' motion to dismiss is denied because Somers has pleaded sufficient facts to establish a plausible claim that he is a whistleblower under the Dodd-Frank Act. An external complaint to the SEC is not required under Rule 21F2-(b)(1), and that rule is entitled to *Chevron* deference. The Court finds, and hereby certifies pursuant to 28 U.S.C. § 1292(b), that this aspect of the Court's order is appropriate for interlocutory appeal, as the issue presented "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*; *see also* Docket No. 61 (Order granting Defendants' request

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Somers did not share any confidential information with me about his job at Digital Realty. My representation of Mr. Somers was limited to advising him on issues relating to the negotiation for an employment agreement with Newcastle." Eugene Jacobs Decl. at ¶14.

to certify for interlocutory appeal, and explaining this Court's reasoning).

Plaintiff's motion to disqualify Seyfarth Shaw is denied because Seyfarth's short representation of Somers is wholly unrelated—let alone substantially so—to Seyfarth's current representation of Digital Realty.

This order disposes of Docket Nos. 20 and 31.

IT IS SO ORDERED.

Dated: July 22, 2015

/s/ Edward M. Chen
EDWARD M. CHEN
United States District Judge